

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number: 06694-003001
	Application Number 10/800,466	Filed March 15, 2004
	First Named Inventor Richard Cogswell	
	Art Unit 3772	Examiner Kim M. Lewis

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a Notice of Appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.


I am the

☐ applicant/inventor.

☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)

☒ attorney or agent of record 30,175
(Reg. No.)

☐ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 _____


 Signature

 Timothy A. French
 Typed or printed name

 (617) 542-5070
 Telephone number

 April 23, 2008
 Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

☒ Total of 3 forms are submitted.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Richard Cogswell	Art Unit :	3772
Serial No. :	10/800,466	Examiner :	Kim M. Lewis
Filed :	March 15, 2004	Conf. No. :	3188
Title :	SLEEP-AIDING DEVICE		

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR PRE-APPEAL BRIEF REVIEW

Pursuant to United States Patent and Trademark Office OG Notices: 12 July 2005 – New Pre-Appeal Brief Conference Pilot Program, this request for a review of identified matters on appeal is hereby submitted with the Notice of Appeal. Review of these identified matters by a panel of examiners is requested because the rejections of record are clearly not proper, and are without basis, in view of a clear legal or factual deficiency in the rejections. All rights to address these and other matters on appeal in any subsequent appeal brief are expressly reserved.

Claims 1-18 are pending. Claims 1 and 16 are the only pending independent claims. Claims 16-18 were allowed in an Advisory Action mailed April 9, 2008. Claims 1-15 stand rejected. In particular, claims 1, 3-7 and 10-14 are rejected under 35 USC §102(b) as being anticipated by Toso U.S. 5,643,184, and claims 2, 8, 9 and 15 are rejected under 35 USC §103(a) as being obvious and therefore unpatentable over Toso '184.

Applicants specifically request the panel to review the following issues:

1. Toso '184 fails to support a *prima facie* case of anticipation.
2. Toso '184 fails to support a *prima facie* case of obviousness.

Turning now to the claims, Applicant's claimed invention is a sleep-aiding device for reducing leg muscle cramping during sleep. The sleep-aiding device includes a belt member being worn at a wearer's waist in use during sleep; first leg members being worn in use during sleep, with upper end portions attached at the belt member and lower end portions each attached at lower portions of a wearer's legs, below the wearer's knee. The leg members are adjustable to predetermined lengths between attachment at the belt member and attachment at the lower portions of the wearer's legs, the predetermined lengths of the leg members being selected to

restrict stretching of the wearer's legs to full extension during sleep. In the embodiment of the claims at issue, shown in FIGS. 1, 2, 3 and 5, the lower end portions of the legs members define loops received about each of the wearer's feet, generally midway between the toes and ankle.

As argued by Applicant in an earlier response, and quoted by the Examiner in the Office action mailed October 23, 2007:

Toso '184 does not teach or suggest Applicant's invention, as now more clearly claimed. In particular, Toso '184 fails to teach or suggest first and second leg members of predetermined length between attachment at the belt member and attachment at the wearer's lower leg portions (claim 1), e.g. by lower loops receiving each of the wearer's feet (claims 3-9), e.g. between the toes and ankles (FIG. 1) ..., the predetermined lengths of the leg members being selected to restrict stretching of the wearer's legs to full extension during sleep. Rather, in the back support device of Toso '184, the intermediate knee engaging loops 36 and 38 are formed of "elastic material" (column 2, lines 20-21), and "[b]ecause of the elasticity of the knee loops, the pressure of the feet extends to the lower back while keeping the legs free to move and to be rapidly extended, as may be required when driving." (column 2, 23-26). Thus, contrary to Applicant's sleep-aiding device, the back support device taught by Toso '184 is specifically constructed to permit full extension of the wearer's legs.

In the instant action, the Examiner maintains the rejections for anticipation and obviousness, arguing that since the lengths of the straps in the Toso '184 device have the capability of being adjusted, it would be obvious to shorten the straps "to prevent/restrict full extension of the wearer's legs during sleep, even when the strap or a portion thereof is constructed from elastic material."

The Examiner thus proposes to base the rejection of claims 1-15 on modification or adjustment of the Toso '184 prior art device to such a degree that the utility of the Toso '184, as intended by the inventor (Toso), and as recited above, would be eliminated completely. We submit in response that such a proposal is taught or suggested in the prior art at the time of Applicant's invention, but could only result from use of hindsight, with Applicant's invention serving as a roadmap, which is impermissible grounds for rejection. On this basis, we submit that independent claim 1, and claims 2-15 dependent therefrom, are all distinguished over the prior art and now in condition to be allowed.

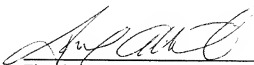
We submit further that this application is now in condition for allowance. Early favorable action is solicited.

Please apply the fee for the further extension of time (\$295.00, representing the difference between a two month extension, which was paid with the earlier response, and a three month extension for a small entity), and any other charges or credits, to deposit account 06-1050.

Respectfully submitted,

Date:

April 23, 2008



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